



Bureau of Mediation Services

STATE OF MINNESOTA

IN THE MATTER OF A PETITION FOR CLARIFICATION OF AN APPROPRIATE UNIT

October 13, 2015

Independent School District No. 704, Proctor, Minnesota
- and -

American Federation of State, County and Municipal Employees, Council No. 5, South St. Paul,
Minnesota

BMS Case No. 14PCL0007

UNIT CLARIFICATION ORDER

INTRODUCTION

On July 3, 2013 the State of Minnesota, Bureau of Mediation Services (Bureau) received a Unit Clarification Petition (Petition) filed by the American Federation of State, County and Municipal Employees, Council No. 5, South St. Paul, Minnesota (AFSCME or Union). The petition requested clarification of an appropriate unit of employees of Independent School District No. 704, Proctor, Minnesota (Employer or District).

A pre-hearing conference was conducted by the Bureau on October 12, 2013 and a hearing was held on March 11, 2014. At the close of the hearing the parties agreed to submit post-hearing briefs no later than April 4, 2014. Both parties submitted briefs within the agreed-upon time limits.

APPEARANCES

At the hearing, Mr. John Westmoreland, Northern Field Director, appeared on behalf of the Union; and Ms. Maggie Wallner, Attorney at Law, appeared on behalf of the Employer. All interested parties were provided an opportunity to present testimony and.

At the hearing the Employer requested dismissal of the petition based upon the assertion that the Union failed to present evidence to support its claim. On May 30, 2014 the Commissioner issued an Order rejecting the motion for dismissal and finding that the hearing record failed to include evidence needed to determine the issue presented. The same Order directed the District to provide the following data:

Not later than June 6, 2014, the Employer is ordered to provide the name, job title, and actual hours worked during each work week for the 2012-2013 and 2013-2014 school year for each employee of the district whose employment meets the following definition:

All employees of the District not required to be certified by the State Board of Education, excluding all employees of the Transportation Department except clerical, and further excluding supervisory and confidential employees.

Following an agreed upon extension, the District provided the information on July 9, 2014.

ISSUE

At the hearing the parties did not agree upon the issue. The Union posits the issue as:

“What is the normal work week of the Proctor Basic Bargaining Unit and have certain employees been improperly excluded from the Bargaining Unit?”

The Employer argues that the issue is:

“Are part-time employees (14 hours or less per week) properly excluded from the bargaining unit?”

The Bureau holds that the issues are:

1. What is the normal work week for full time employees of the appropriate bargaining unit?
2. What is the threshold for excluding employees from the appropriate bargaining unit because they are not public employees within the meaning of Minn. Stat. §179A.03 Subd. 14, (5)?

This statement of the issue reflects the Bureau’s understanding of the reason the petition was filed. Council 5 filed the petition; in answering the question on the petition “Define Clarification or Amendment requested, the Union wrote “MN State statute 179A.03, Subd 14.e are 14 hour employees in the bargaining unit?” (emphasis added). The District argues the Bureau should only consider the question of whether those employees who work fourteen (14) hours per week are within the appropriate unit. They oppose consideration of the obvious underlying question raised by AFSCME. During pre-hearing proceedings, at the hearing and its post-hearing written argument AFSCME made it clear that they were asking for a determination of which part-time employees are included in the bargaining unit and which are not. The Bureau has a responsibility to resolve the issues presented in full rather than based upon the narrow one-line description of the issue written on the petition form. Finality and predictability require a full resolution of the issues raised by the Union.

POSITIONS OF THE PARTIES

AFSCME asserts that the threshold for determining public employee status and eligibility for inclusion in the appropriate unit is something less than fourteen hours per week. AFSCME further argues the normal work week is not forty hours and varies by employee; therefore the 35 percent standard is applicable, meaning the number of hours per week to be determined a public employee is less than fourteen hours.

The Employer argues the petition seeks only employees working fourteen hours per week and that the Statute defines a public employee as only those employees working more than fourteen hours per week or 35 percent of the normal work week. The Employer also argues the Labor Agreement between the parties establishes the normal full time work week as forty hours per week.

BACKGROUND

The Union was first certified to represent certain employees of the District on April 25, 1959. The Bureau has since clarified the Unit description and also clarified the inclusion and exclusion of certain employees. Currently the description of the appropriate unit is included within the parties' Collective Bargaining Agreement (CBA) Exhibit 1, Article 2 – Recognition, provides:

Section 2. Appropriate unit. The exclusive representative shall represent all employees of Independent School District No. 704, Proctor Minnesota, who are not required to be certified by the State Board of Education, who are public employees as per state statute, excluding all employees of the Transportation Department except clerical, and further excluding supervisory and confidential employees.

APPLICABLE STANDARDS

The Minnesota Public Employment Labor Relations Act, Minn. Stat. § 179A (PELRA) establishes the right of Minnesota public employees to form and join labor organizations. In order to be eligible to participate in collective bargaining an employee must be a “public employee” as set forth at Minn. Stat. § 179A.03, Subd. 14. This subdivision provides that every person appointed or employed by a public employer is a public employee with certain exceptions. § 179A.03, Subd. 14(5) excludes from public employee status:

part-time employees whose service does not exceed the lesser of 14 hours per week or 35 percent of the normal work week in the employee's appropriate unit;

In ISD No. 721, New Prague, MN v. School Service Employees, Local 284, 379 N.W. 2d 673 (App., 1986), the Minnesota Court of Appeals held that the part-time threshold is to be determined by reference to the normal predominant full-time work week of employees in the appropriate unit.

In AFSCME Council 65 and ISD No. 2184, Luverne, BMS Case No. 01PCL0545, the Bureau confirmed that collective bargaining may determine the normal work week. The Bureau found that the collective bargaining agreement between the parties established a normal (full-time) work week. The Bureau has traditionally held that agreements bargained by labor and management, over a number of years, will be persuasive in determining the dimensions of bargaining unit inclusion and exclusion.

DISCUSSION

Collective Bargaining Agreement

The initial question before the Bureau is whether the parties, through collective bargaining over a number of years, have agreed upon a normal work week for the purpose of defining bargaining unit inclusion pursuant to Minn. Stat. § 179A.03, Subd. 14(5). If so, as established by our previous holdings, such agreement would define the normal work week for the purposes of this matter.

The CBA includes the following relevant provisions:

Article 11- Holidays

Section 4. Part-Time Employees. Those employees working less than forty (40) hours per week shall receive holiday pay on a pro-rated basis according to the average daily hours worked during the five (5) working days immediately preceding the holiday.

Article 12- Vacations

Section 2. Part-time Employees. Those employees working less than 173 hours per month shall receive paid vacation according regularly (sic) scheduled daily hours approved by the School Board.

Article 13- Work Week, Work Day, and Overtime Positions

Section 1. Work Day/ Work Week. All classified employees working under classifications included in Article 8 of this contract shall work eight (8) hours per day and forty (40) hours per week, or as otherwise agreed upon between the Union and the Proctor School Board. Any change of hours of existing employees must be with the consent of the Union and reduced to writing, except when employees may be asked to report ½ hour early and leave ½ hour early, for snow removal. The District may set hours for newly-hired employees as it deems advisable. Thereafter, however, any change in hours of such newly-hired employees must be with the consent of the Union and reduced to writing.

Article 18- Leaves of Absence

Section 1, Sick Leave. ...Those working less than 173 hours per month shall receive sick leave according to regularly scheduled daily hours approved by the School Board... (relevant portion only reproduced)

Articles 11, 12, and 18, address Holiday, Vacations, and Leaves of Absence respectively. The relevance of these provisions is that each prorates the applicable benefits as measured against a forty hour work week or its equivalent. Taken together, these provisions show that the parties have used a forty hour work week as the baseline to establish full benefit eligibility. These provisions by themselves do not conclusively establish a specific agreement to adopt a fixed “normal work week” rather than the flexible standard set forth at § 179A.03, Subd. 14(5) for the purpose determination of public employee status or bargaining unit inclusion was agreed parties.

Article 13, provides that all employees shall work 40 hours per week unless agreed upon otherwise. It also states that the employer may set hours of newly-hired employees as it deems advisable. The facts in this case are distinguished from *Luverne* (ibid) because in that case the collective bargaining agreement between the parties provided specifically:

ARTICLE XI HOURS OF SERVICE AND DUTY YEAR

Section 1: For full-time employees, the normal work day shall consist of eight (8) hours, exclusive of lunch. The normal work week shall consist of forty hours. The normal work year for full time year around employees shall consist of 2080 hours. The school year or school calendar year shall be prescribed by the employer on an annual basis.

In comparison, the CBA between the parties in this case fails to establish an agreement that the “normal work week” for the purposes of determining bargaining unit eligibility is different from the flexible standard explicitly stated at § 179A.03, Subd. 14(5). Here, the reference to “normal work week” is absent; further the Employer is free to set the work week for newly-hired employees at its discretion.

Normal Work Week

Having determined that the parties’ CBA does not define a “normal work week” for the purpose of bargaining unit inclusion, we turn to the question of a statutory determination. As noted above, the Court in *New Prague* (ibid) upheld the Bureau’s determination that the “normal work week” is to be established by reference to the “the most usual or predominate full-time work week.”

Evidence of normal work hours for those employees in classifications covered by the CBA, is found in the District’s July 9, 2014 submission in response to the Bureau’s Order. The submission consists of a spread sheet showing hours worked by all employees, working in classifications covered by the agreement during the 2012-2013 and 2013-2014 school years. This submission is the factual basis to determine the hours of work for employees of the District holding positions that are listed in the CBA.

In *New Prague*, Commissioner Goldberg wrote:

It is possible, as in the instant case, to find more than one “normal full-time work week” within an appropriate unit. Many of the Units established in the public sector include employees with diverse occupational functions. One occupational group may have a

normal work week which differs from the normal work week of another occupational group. (New Prague, 85-PR-100-A, p4, February 21, 1984.

In the matter at hand, the CBA, at attachment 'C', lists 27 classifications covered by the agreement. These classifications are highly diverse and the employees who fill them work a variety of hours. Based upon the nature of the work and pattern of hours worked, these can be separated into five occupational groups as illustrated below:

Titles from Attachment C of CBA	Data from District Submission
Secretarial/Clerical	
Attendance Aide Clerk Middle School Secretary Sr. High Secretary Guidance Secretary Bay View Secretary Food Service Coordinator Elementary Secretary	
Number of employees	Between 2 and 7 employees were scheduled each week
Weeks Worked	At least 1 employee worked in 52 weeks
Most Hours Worked	1 to 5 employees per week worked 40 hours or more in 48 weeks
Most Frequent Weekly Hours	40 hours per week in 37 work weeks
Technology	
Technology Support Specialist Technology Support Technician Media Center Clerk	
Number of employees	1 employee was scheduled in each of the 44 weeks worked
Weeks Worked	44 weeks
Most Hours Worked	1 employee worked at least 40 hours in 42 weeks
Most Frequent Weekly Hours	40 hours per week in 42 work weeks
Educational Assistant	
Educational Assistant Highly Qualified Educational Assistant Print Shop Monitor Student Monitor	
Number of employees	Between 1 and 45 employees were scheduled each week that employees worked
Weeks Worked	At least 1 employee worked in 51 weeks
Most Hours Worked	1 to 5 employees per week worked 40 hours or more in 38 weeks
Most Frequent Weekly Hours	32.5 hours per week in 26 work weeks

Health	
COTA PTA Deaf Interpreter Health Technician/RN LPN	
Number of employees	Between 1 and 6 employees were scheduled each week that employees worked
Weeks Worked	At least 1 employee worked in 42 weeks
Most Hours Worked	1 employee per week worked 40 hours or more in 27 weeks
Most Frequent Weekly Hours	32.5 hours per week in 22 work weeks
Custodial Maintenance	
Maintenance Custodial Engineer (HS) Custodial Engineer Custodial Janitor Custodial	
Number of employees	Between 6 and 13 employees were scheduled each week that employees worked
Weeks Worked	At least 1 employee worked in 52 weeks
Most Hours Worked	4 to 8 employees per week worked 40 hours or more in 52 weeks
Most Frequent Weekly Hours	40 hours per week in all 52 work weeks
Food Service	
Head Cook Cook – 150 or less Cook Assistant Cook Assistant (Licensed)	
Number of employees	Between 3 and 17 employees were scheduled each week that employees worked
Weeks Worked	At least 1 employee worked in 42 weeks
Most Hours Worked	1 or 2 employees per week worked 40 hours or more in 28 weeks
Most Frequent Weekly Hours	No single schedule is most frequently worked

These facts demonstrate that the predominant full-time work week for employees within each occupational grouping within the appropriate bargaining unit is forty hours. In accordance with the statute, part-time employees whose service does not exceed fourteen hours per week are not public employees and are excluded from the appropriate unit.

Because the parties disagreed over the issue presented, we clarify this further. Consistent with statute and previous Bureau decisions, employees who work **more than** (emphasis added) fourteen (14) hours in a majority of weeks in which they work during the year are public employees and included within the appropriate unit, and those who work less are not public employees and excluded from the appropriate unit. These are school district employees and most employees only work during those weeks school is session. Thus a "year" for this group starts in the fall when school begins and ends with the beginning of the next school year.

FINDINGS AND ORDERS

1. Classifications currently within the appropriate unit fall within five distinct occupational groupings, Custodial Maintenance, Educational Assistants, Food Service, Health, and Technology.
2. For each occupational grouping, the normal work week for the purpose of Minn. Stat. § 179A.03, Subd. 14(5) is forty (40) hours.
3. Individual employees who do not work more than fourteen (14) hours per week during a majority of the weeks in which they work in a school year (as described above) are excluded from the appropriate unit.

STATE OF MINNESOTA
Bureau of Mediation Services



JOSH L. TILSEN
Commissioner

cc: John Engelking
John Westmoreland
Maggie Wallner
Chelsa Nelson

POSTING

THE EMPLOYER SHALL MAKE COPIES OF THIS ORDER AND ANY ATTACHMENTS UPON RECEIPT AND POST AT THE WORK LOCATION(S) OF ALL INVOLVED EMPLOYEES.